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Supreme Court, U.S.
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No.00-323

IN THE
SUPREME COURT OF THE UNITED STATES

CITY OF MCALESTER, et al.,
Petitioners,

v.

PITTSBURG COUNTY RURAL WATER DISTRICT NO.7, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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INTRODUCTION

To paraphrase the Oklahoma Court of Civil Appeals, 7 U.S.C. § 1926(b) is not applicable to the Taylor Industrial Park ("Park") because Section 1926(b) requires an encroachment by the municipality into the territory of the rural water district. "If anything, the reverse is true here making [Section 1926(b)] inapplicable." *Westville Util. Auth. v. Bennett*, 903 P.2d 880, 883 (Okla. App. 1995).

In *Westville Utility Authority*, a rural water district claimed an exclusive right to serve water to a laundromat that had been served for many years by the town of Westville through its Utility Authority. The laundromat switched from the town's water service to rural water district service in April 1992. When the town of Westville challenged the rural water district's actions, the Oklahoma Court of Civil Appeals flatly rejected the rural water district's claim of an exclusive right to serve the laundromat. The federal anticompetitive protection claimed by the rural water district, based on 7 U.S.C. § 1926(b), did not apply because the statute was intended to protect against encroachment by a municipality into a rural water district's service area. Section 1926(b) was not intended to *support* a rural water district's effort to encroach on the service area of a municipality.

In this case, Pittsburg has attempted to wrest control of water services to the Park by urging an overly broad application of Section 1926(b). As demonstrated by McAlester's Petition for Writ of Certiorari, the overly broad application of Section 1926(b) urged by Pittsburg is contrary to federal law of statutory interpretation.

Pittsburg has never served water to the Park. Pittsburg owes no duty to serve the disputed customers. In fact, Pittsburg likely has no intention of ever serving the disputed customers. If Pittsburg is granted an exclusive right to serve the disputed customers, these customers would likely be forced to build additional water lines and facilities so that Pittsburg could provide water service. The result is economic waste: McAlester already provides water service to the disputed customers, and has done so since before Pittsburg was indebted to the federal government. Pittsburg hopes that it can use federal-court judgments enforcing this economic waste to force McAlester to buy Pittsburg's right to serve the disputed customers. This inequitable result is not what the framers of Section 1926(b) intended.

ARGUMENT

The issue of whether 7 U.S.C. § 1926(b) should be construed narrowly or broadly was pressed and passed upon in the district court and the Tenth Circuit.

The most significant flaw in Pittsburg's Response is its claim that McAlester waived its claims regarding the constitutionality of Section 1926(b). McAlester has consistently argued throughout this litigation that Section 1926(b) should be applied narrowly, and that Pittsburg's suggested rules for application of Section 1926(b) were far too broad. Throughout this litigation, both sides have advanced alternative methods of interpreting Section 1926(b). Pittsburg urged extreme methods of applying the anticompetitive protection found in Section 1926(b) – methods that are even more extreme than the broad interpretation adopted by the Tenth Circuit. The briefing cycle in the Tenth

Circuit proceedings in this case was complete when the Tenth Circuit announced its decision in *Sequoyah County Rural Water Dist. No. 7 v. Muldrow*, 191 F.3d 1192 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1532, 120 S. Ct. 1548 (2000).

The specific interpretation arguments contained in McAlester's Petition for Writ of Certiorari were also contained in McAlester's Petition for Rehearing to the Tenth Circuit. Those arguments were rejected by the Tenth Circuit when that Court overruled the Petition for Rehearing on May 31, 2000.

McAlester's argument that the Tenth Circuit's broad application of Section 1926(b) is constitutionally infirm is simply an extension of McAlester's consistent argument that Section 1926(b) must be construed narrowly. The new aspects of McAlester's argument were necessitated by the Tenth Circuit's decision, applying Section 1926(b) much more broadly than prior courts.

The Supreme Court's decisions have recognized the Court's power to consider pertinent arguments on federal claims that are properly presented. *Lebron v. National Rr. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980). The Court's "traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron*, 513 U.S. at 379 (internal quotations omitted; citations omitted).

McAlester's position that the Tenth Circuit's interpretation of Section 1926(b) is inconsistent with congressional power and federal antitrust laws is not a new claim. At worst, McAlester's argument on congressional

power and federal antitrust laws is a new argument to support McAlester's consistent claim: that Section 1926(b) should be construed narrowly to allow McAlester to serve water to its current customers. Furthermore, the Tenth Circuit's interpretation of Section 1926(b) is based on a newly announced liberal-interpretation standard. As a result, any arguments against the new standard would by definition be new arguments.

Finally, contrary to Pittsburg's assertion,[1] the standard for interpretation of Section 1926(b) is a question that was squarely and principally addressed by both the District Court

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[1] Pittsburg suggests that the Tenth Circuit's broad standard for interpretation of Section 1926(b) was secondary to a timing issue. [Pittsburg's Response, at p. 3.] The Tenth Circuit rested its decision squarely on the broad standard, ruling that "the district court applied the wrong standard to determine whether the District made service available to the disputed customers." [Appendix A, at p. 11a.] Pittsburg is disingenuous when it suggests that the Tenth Circuit rested its decision on a rule that Section 1926(b) analysis should be applied "when the customer first requested or should have requested water service which is the appropriate time to address the issue of whether service is made available." [Pittsburg's Response, at p. 3.] The Tenth Circuit's treatment of the timing issue on pages 11a and 12a of Appendix A shows that Pittsburg's description has skewed the Tenth Circuit's decision, inserting a confused view in an apparent effort to influence future judicial statements of the rules discussed by the Tenth Circuit. The Tenth Circuit recognized that the pipes-in-the-ground test must consider whether the rural water district has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made. [Appendix A, at p. 12a.] The Tenth Circuit did not hold that the District Court must determine when a request was first made, or when a request should first have been made, as suggested by Pittsburg.

and the Tenth Circuit. [Appendix A, at p. 11a; Appendix B, at pp. 24a-26a, 30a-31a.]

The Court's traditional rule "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); *see also Lebron*, 513 U.S. at 379. That "rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Williams*, 504 U.S. at 41; *see also Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

This rule is sensible in this case because the Tenth Circuit has adopted a new rule of construction that will govern all future cases in its jurisdiction involving Section 1926(b). A court's resolution of an issue of law is fairly presented for review, whether or not it was pressed by a party. There can be no doubt that in this case, the Tenth Circuit has announced a new and broad standard of construction for Section 1926(b). If allowed to stand, the Tenth Circuit's new standard for construction of Section 1926(b) will bind courts in all Section 1926(b) litigation in the Tenth Circuit. Furthermore, an appropriate review of the Tenth Circuit's new standard for construction of Section 1926(b) necessarily entails an analysis of the constitutional limitations on interpretation of the statute, as well as possible conflicts between the new standard and federal antitrust laws.

The Court has long applied the rule that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J.*

DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); *see also Allentown Mack Sales & Serv., Inc. v. National Labor Relations Bd.*, 118 S. Ct. 818, 833 (1998) (Rehnquist, C.J., concurring in part and dissenting in part) (relying on *Edward J. DeBartolo Corp.*). This rule "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

In reviewing the Tenth Circuit's new liberal-interpretation standard for Section 1926(b), the Court would be obliged to consider whether the Tenth Circuit's interpretation is consistent with the Spending Clause power with which Congress enacted Section 1926(b). The Court should assume that Congress did not intend to exceed the scope of its Spending Clause power. The Court should also assume that Congress did not intend to facilitate an unconstitutional taking of municipally-owned infrastructure by enacting Section 1926(b). For these reasons the Tenth Circuit's interpretation of Section 1926(b) raises serious constitutional problems. The more appropriate interpretation of Section 1926(b), urged by McAlester in its Petition for Writ of Certiorari, would avoid these constitutional problems.

Furthermore, to the extent that it is necessary to determine congressional intent in interpreting Section 1926(b), the Court must consider federal case law requiring narrow construction of statutes that provide exceptions to federal antitrust laws. In interpreting federal statutes, the Court assumes that when it passes legislation, Congress is

aware of existing law, including basic rules of statutory construction. *South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 801 (1998); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991). Thus, the Court should assume that Congress was aware that an antitrust safe harbor such as Section 1926(b) would be construed narrowly, as required by this Court's decisions, including *Jefferson County Pharmaceutical Assn. v. Abbott Labs.*, 460 U.S. 150, 159, *reh'g denied*, 460 U.S. 1105 (1983). The Court should assume that Congress intended Section 1926(b) to be interpreted in a manner consistent with such decisions.[2]

When the Court is presented with a claim that involves a federal statute, issues of statutory interpretation should never be outside the Court's reach. Pittsburg's argument to the contrary should be rejected.

CONCLUSION

Pittsburg is incorrect in its argument that McAlester has waived its statutory-construction arguments. The interpretation of Section 1926(b), and the standard for its interpretation, have been "pressed and passed upon." McAlester should not be limited to the precise arguments that it raised before the new liberal standard was pronounced by the Tenth Circuit on evidentiary issues affecting statutory interpretation. More importantly, Pittsburg has failed to

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[2] Pittsburg's response to this issue includes a lengthy discourse on waiver of public rights. [Response, at pp. 8-10.] Pittsburg's argument on waiver of public rights is impertinent to McAlester's argument that Section 1926(b) should be interpreted narrowly because it is an exception to federal antitrust laws.

demonstrate that the Tenth Circuit's liberal interpretation of Section 1926(b) can be reconciled with federal antitrust laws and constitutional constraints on congressional power. The construction advanced by McAlester in this case is more reasonable, more consistent with the text of the statute, and avoids the constitutional problems identified in the Petition for Writ of Certiorari.

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